Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

(3)

No. 93-1468

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM POPELKA, ET AL., PETITIONERS

v.

ERIC LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARC RICHMAN
CAROL FEDERIGHI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

23 PP

QUESTIONS PRESENTED*

1. Whether (in No. 93-1468) the Civil Service Reform Act of 1978, as amended, precludes an action brought by petitioners in district court to seek redress for their termination from federal employment.

2. Whether (in No. 93-1478) the Merit Systems Protection Board properly dismissed petitioners' appeal of their termination on the ground that they were hired as temporary employees.

3. Whether (in both cases) petitioners' failure to find either a judicial forum or an administrative forum for review of the merits of their claims based on termination of their federal employment violates the Due Process Clause of the Constitution.

---

* Petitioners have filed two petitions for certiorari (Nos. 93-1468 and 93-1478) seeking review of decisions in two actions that arose out of the same events. This response addresses both petitions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Discussion	7
1. The Federal Circuit's decision	8
2. The Ninth Circuit's decision	10
3. The effect of the Federal Circuit's decision on the Ninth Circuit's jurisdictional ruling	13
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Berrios v. *Department of Army*, 884 F.2d 28 (1st Cir. 1989)	12
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	4
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	16
Bush v. *Lucas*, 462 U.S. 367 (1983)	12
Chu v. *United States*, 773 F.2d 1226 (Fed. Cir. 1985)	9
Cinnamon v. *FAA*, 10 M.S.P.R. 598 (1982)	17
FDIC v. *Meyer*, 114 S. Ct. 996 (1994)	13
Grigsby v. *United States Department of Commerce*, 729 F.2d 772 (Fed. Cir. 1984)	9, 10
Harrison v. *Bowen*, 815 F.2d 1505 (D.C. Cir. 1987)	11, 17
Hill v. *Department of Air Force*, 884 F.2d 1318 (10th Cir. 1989), cert. denied, 495 U.S. 947 (1990)	12
Hunter v. *Department of Army*, 40 M.S.P.R. 449 (1989)	17
Julius v. *Department of Army*, 35 M.S.P.R. 130 (1987), aff'd, 852 F.2d 1293 (Fed. Cir. 1988)	9
Karamanos v. *Egger*, 882 F.2d 447 (9th Cir. 1989)	13
Orloff v. *Cleland*, 708 F.2d 372 (9th Cir. 1983)	16
Perez v. *MSPB*, 931 F.2d 853 (Fed. Cir. 1991)	9
Perry v. *Sindermann*, 408 U.S. 593 (1972)	16

Cases—Continued: Page

Rivera v. *United States*, 924 F.2d 948 (9th Cir. 1991) 15
Roth v. *Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988) 16
Ryon v. *O'Neill*, 894 F.2d 199 (6th Cir. 1990) 11, 15
Saul v. *United States*, 928 F.2d 829 (9th Cir. 1991) 10, 11, 12, 15
Schrachta v. *Curtis*, 752 F.2d 1257 (7th Cir. 1985) 11
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 12
Special Counsel v. *GSA*, 45 M.S.P.R. 411 (1990) 17
Stephens v. *HHS*, 901 F.2d 1571 (11th Cir.), cert. denied, 498 U.S. 998 (1990) 11
Tucker v. *Defense Mapping Agency*, 607 F. Supp. 1232 (D.R.I. 1985) 15
United States v. *Fausto*, 484 U.S. 439 (1988) 10, 11, 14
Veit v. *Heckler*, 746 F.2d 508 (9th Cir. 1984) 11
Webster v. *Doe*, 486 U.S. 592 (1988) 16
Wren v. *Department of Army*, 2 M.S.P.R. 1 (1980) 17

Constitution, statutes and regulation:

U.S. Const.:
Amend. I 13
Amend. V (Due Process Clause) 3
Back Pay Act, 5 U.S.C. 5596(b)(1) 11, 14
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 4
5 U.S.C. 2302(a) (1988 & Supp. IV 1992) 5, 17
5 U.S.C. 2302(a)(2)(B) 17
5 U.S.C. 2302(b) (1988 & Supp. IV 1992) 17
5 U.S.C. 7121(f) 10
5 U.S.C. 7511(a) (Supp. IV 1992) 6
5 U.S.C. 7511(a)(1)(A)(ii) (Supp. IV 1992) 8
Veterans Readjustment Act:
38 U.S.C. 4214(b)(1) (Supp. IV 1992) 2
38 U.S.C. 4214(b)(1)(D)(ii) (Supp. IV 1992) 2
38 U.S.C. 4214(b)(1)(E) (Supp. IV 1992) 3

Statutes and regulation—Continued:	Page
Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16:	
5 U.S.C. 1212(a) (Supp. IV 1992)	17
5 U.S.C. 1214 (Supp. IV 1992)	17
5 U.S.C. 1214(b) (Supp. IV 1992)	5
5 U.S.C. 1215 (Supp. IV 1992)	17
5 C.F.R. 316.402(b)(4)	2
Miscellaneous:	
S. Rep. No. 969, 95th Cong., 2d Sess. (1978)	10

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1468

WILLIAM POPELKA, ET AL., PETITIONERS

v.

ERIC LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-6) and the district court (Pet. App. 7-20, 21-23) are unreported.[1]

[1] Petitioners have also filed a petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit (No. 93-1478) seeking review of a judgment in a closely related case. The appendix to the petition in this case includes the decisions in the related case, specifically, the opinion of the Federal Circuit, reported at 12 F.3d 1069 (Pet. App. 33-43), and the opinion of the Merit Systems Protection Board, reported at 56 M.S.P.R. 316 (Pet. App. 24-32). For the Court's convenience, in discussing the decisions in the related case, we shall refer to the copies of those decisions reprinted in the appendix to the petition in this case.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1994. The petition for a writ of certiorari was filed on March 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petition in this case is related to another petition filed by the same petitioners, No. 93-1478. These petitions should be considered together; they contain identical Statement, Argument, and Conclusion sections. To facilitate the Court's consideration, we address both petitions here.

1. The three petitioners were hired in 1990 by the General Services Administration (GSA) as temporary janitorial employees in the Federal Building in Billings, Montana (Pet. App. 8, 34). GSA has a national policy directing that vacancies in the custodial force be filled with temporary employees where contracting out is being considered. C.A. Supp. E.R. 5. Petitioners were appointed under the authority of 5 C.F.R. 316.402(b)(4), which permits the noncompetitive, temporary limited appointment of certain groups of individuals, including those who would meet the qualifications for appointment under the Veterans Readjustment Act (VRA), 38 U.S.C. 4214(b)(1) (Supp. IV 1992). Temporary limited appointments under 5 C.F.R. 316.402(b)(4) are not the same as permanent appointments under the VRA, which provides that veterans may obtain permanent federal employment after a probationary period of employment, see 38 U.S.C. 4214(b)(1)(D)(ii) (Supp. IV 1992), and which affords appointees the right to appeal termination during the first year of employment to the Merit

Systems Protection Board (MSPB), see 38 U.S.C. 4214(b)(1)(E) (Supp. IV 1992).

Each petitioner was initially appointed to a temporary appointment limited to one year. After the first appointment expired in 1991, each was then reappointed to a second temporary appointment limited to one year. Pet. App. 28, 34; C.A. E.R. 1-4; C.A. Supp. E.R. 1-3. In 1992, while petitioners were serving their second temporary appointments, GSA decided to terminate them (Pet. App. 35), so that it could contract out custodial labor to an organization providing employment to disabled workers (*id.* at 8). GSA has a long-standing policy favoring the contracting out of janitorial services. C.A. Supp. E.R. 5.

2. Petitioners sought relief from the proposed terminations in the United States District Court for the District of Montana. Petitioners sued GSA and Eric Lee, GSA's Regional Administrator who had ordered the termination of eleven temporary employees in three cities, including petitioners. In their complaint, as amended, petitioners alleged that their terminations without advance notice violated the Due Process Clause of the Fifth Amendment, in that the failure to provide notice prevented their union from exercising the right to contest the terminations under the union's collective bargaining agreement with GSA (C.A. E.R. 65). Petitioners also alleged that they had been appointed under the VRA, and that respondents had acted contrary to law by acting as though petitioners were temporary employees, and allegedly circumventing the preferences and protections afforded by law to VRA appointees (*id.* at 66).

Petitioners requested a declaratory judgment that they were entitled to permanent employment, *Bivens-*

type[2] damages for alleged due process violations in connection with their employment, a preliminary injunction against their terminations, and a writ of mandamus compelling GSA to bargain with the union over their terminations (Pet. App. 11). In their subsequent briefs, petitioners explained that their claim to permanent employment was based on a theory of equitable estoppel, namely, that GSA should be estopped from treating petitioners as temporary employees because it allegedly misled them into thinking they had permanent positions (*id.* at 8-11; Pet. 5-7, 12).

The district court dismissed the action for lack of subject matter jurisdiction, holding that its jurisdiction to review the merits of petitioners' estoppel and *Bivens* claims was foreclosed under the Civil Service Reform Act of 1978 (CSRA) (Pet. App. 7-20).[3] The court observed that Congress had created, through the CSRA, a "comprehensive system of administrative review" governing claims arising out of federal employment (*id.* at 19), and concluded that this "comprehensive system" precluded judicial review in cases raising government employment

---

[2] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[3] The district court had earlier issued a preliminary injunction enjoining petitioners' removal, pending review by the General Counsel of the Federal Labor Relations Authority (FLRA) of charges filed on their behalf by the union (Pet. App. 9-10). The preliminary injunction lapsed by its own terms when the General Counsel filed an unfair labor practice complaint on their behalf (*id.* at 10). On October 2, 1992, after execution of a settlement agreement by GSA and the union, the FLRA withdrew its notice of hearing and dismissed the General Counsel's complaint (C.A. Supp. E.R. 86).

issues (*id.* at 16-18). The court also observed that petitioners could seek the assistance of the Office of Special Counsel (OSC), which has jurisdiction to investigate "prohibited personnel practice[s]," 5 U.S.C. 2302(a) (1988 & Supp. IV 1992), and which can seek corrective action from the MSPB, 5 U.S.C. 1214(b) (Supp. IV 1992) (Pet. App. 15). The court made it clear, however, that its decision was based on "the intent of Congress in establishing the civil service administrative appeals system," and not the adequacy of any particular administrative remedies available to petitioners (Pet. App. 16).

3. Petitioners moved for relief from the judgment, citing as new evidence a telephone conversation that petitioners' counsel had with an unidentified individual at OSC, suggesting that OSC's administrative process was unavailable to petitioners (Pet. 7). The district court denied the motion (Pet. App. 21-23), reiterating that "[t]he jurisdiction vested in this Court is not dependent upon an analysis of the various administrative options that may or may not be available to [petitioners]" (*id.* at 22).

4. The Court of Appeals for the Ninth Circuit affirmed (Pet. App. 1-6). The court characterized petitioners' claims as "*Bivens*-type constitutional claims" and agreed with the district court that "such claims are not cognizable in federal district court in light of the [CSRA]" (*id.* at 2). The court cited a series of Ninth Circuit cases in which it had "consistently held that federal civil service employment disputes cannot be brought originally in federal district court, but must instead be resolved under the comprehensive administrative scheme created by the CSRA" (*id.* at 3). The court noted that this principle

applies "whether or not the CSRA provides the remedy sought by the federal employee" (*id.* at 4). The court concluded that, although the rights of temporary employees were limited under the CSRA, they were nevertheless covered by that Act and subject to the rule of preclusion (*id.* at 4-5).

5. After the preliminary injunction expired, and while petitioners were pursuing the lawsuit described above, GSA terminated them from employment, and petitioners appealed their terminations to the MSPB. In the initial decision by an administrative judge, the appeals were dismissed for lack of jurisdiction (Pet. App. 24). Petitioners then petitioned for review before the full MSPB.

The MSPB affirmed (Pet. App. 24-32). The MSPB noted that it had jurisdiction over appeals from the removal of an "employee," as that term is defined in 5 U.S.C. 7511(a) (Supp. IV 1992) (Pet. App. 27). The MSPB found that petitioners had failed to show that they met the relevant part of this definition (*id.* at 28-29), because none of them had a year of continuous service under other than a temporary appointment limited to one year or less (*id.* at 28). The MSPB rejected petitioners' argument that it had jurisdiction under an estoppel theory, reasoning that "the [MSPB's] jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by statute or regulation" (*id.* at 30), and that, in the absence of evidence that petitioners actually met the definition of "employee" in Section 7511(a), it had no jurisdiction over their appeals (Pet. App. 30).

6. Petitioners appealed the MSPB's decision to the Court of Appeals for the Federal Circuit, which

affirmed (Pet. App. 33-43). The court noted that petitioners did not deny that their appointments were temporary, but that petitioners argued that their appointment forms should be disregarded because they had been misled as to the nature of the appointments (*id.* at 36, 39-40). The court characterized petitioners' jurisdictional position as arguing "that MSPB jurisdiction may be derived from Government misconduct in the initial employment decision" (*id.* at 40). The court declined to adopt this theory, stating that "[e]stoppel requires a forum; it cannot be used to build a forum" (*id.* at 41). The court concluded that allowing MSPB review on such a basis would "improperly broaden the scope of MSPB authority to include equitable review of agency appointment processes" (*id.* at 42).

DISCUSSION

The Federal Circuit's decision that the Merit Systems Protection Board (MSPB) lacked jurisdiction over petitioners' appeal from their removal because petitioners were serving under temporary appointments is correct and does not conflict with any decision of this Court or any other court of appeals. The Ninth Circuit's decision holding that the Civil Service Reform Act (CSRA) precludes district court jurisdiction over petitioners' claims arising out of federal employment also is correct and does not conflict with any other decisions.

Petitioners' attempt to create a conflict between the two court of appeals' decisions is unavailing. Even though petitioners have been unable to find a judicial or administrative forum for their claims now that the Federal Circuit has affirmed the dismissal of their

claims by the MSPB, the Federal Circuit's holding on the scope of the MSPB's jurisdiction has no effect on the question of federal court jurisdiction considered by the Ninth Circuit, because, as the Ninth Circuit recognized, the CSRA precludes judicial review even where it provides no administrative remedy. Finally, since temporary employees have no constitutionally protected property right to their positions, there is no requirement, as petitioners suggest, that jurisdiction over their claims be found in at least one of the two forums.

1. *The Federal Circuit's Decision*

In pertinent part, the CSRA provides that the MSPB has jurisdiction to review removals of only those employees who "ha[ve] completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." 5 U.S.C. 7511(a)(1)(A)(ii) (Supp. IV 1992). Petitioners do not contest that they were employees serving under temporary appointments limited to one year or less, with appointment (SF-50) forms indicating the temporary nature of their appointments. Petitioners therefore clearly do not meet the statutory requirements for MSPB review of their removals.

Petitioners claim that the MSPB should not have relied exclusively on the "temporary" designation on their SF-50 forms, but should have allowed them to present extrinsic evidence of their employment status in support of their equitable estoppel theory. The statutory provisions governing the MSPB's jurisdiction are clear, however, that jurisdiction is limited to those cases meeting the *legal* require-

ments.[4] *Perez* v. *MSPB*, 931 F.2d 853, 855 (Fed. Cir. 1991) ("The MSPB has jurisdiction over appeals only from the types of agency actions specifically enumerated by law, rule, or regulation."). Petitioners cite no authority for the proposition that the MSPB's jurisdiction could be expanded under a theory of equitable estoppel, and we are not aware of any.

The sole case petitioners cite to support their position that their SF-50 forms should be disregarded, *Grigsby* v. *United States Department of Commerce*, 729 F.2d 772 (Fed. Cir. 1984), is inapposite. In *Grigsby*, both parties agreed that there were errors "in the technical completion of the appointment documents" (SF-50 and SF-52 forms), *id.* at 774, 776, so that the forms did not accurately reflect the government's intention to appoint the appellant in that case as a probationary employee. The Federal Circuit held only that, in light of the parties' agreement that the appointment forms were erroneous, "the Government is not barred from demonstrating ministerial error in the execution of the [forms]." *Id.* at 775-776. Here, it has not been asserted that petitioners' designation as temporary employees on

---

[4] It is well established that the terms and conditions of federal employment are ordinarily governed by the nature of the formal appointment that an employee receives, and not by contractual or quasi-contractual understandings. See *Chu* v. *United States*, 773 F.2d 1226, 1229 (Fed. Cir. 1985) ("federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government"); *Julius* v. *Department of Army*, 35 M.S.P.R. 130, 133 (1987) (an employee has no rights beyond those incident to the position to which he or she is officially appointed), aff'd, 852 F.2d 1293 (Fed. Cir. 1988) (Table).

their SF-50 forms resulted from such a "ministerial error" or that the forms did not accurately reflect the General Service Administration's intention. Petitioners cite no other authority for the proposition that the MSPB can ignore a valid SF-50 form when examining its own jurisdiction.[5]

2. *The Ninth Circuit's Decision*

a. The Ninth Circuit correctly concluded that the CSRA precludes judicial review of petitioners' equitable estoppel claims. As this Court has recognized, the CSRA is a comprehensive statutory scheme enacted to replace an "outdated patchwork" of statutes and rules governing review of federal personnel actions with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 444-445 (1988). "The goal [of the CSRA] was 'a single unified personnel policy which [takes] into account the requirements of all the various laws and goals governing Federal personnel management.' " *Saul* v. *United States*, 928 F.2d 829, 833 (9th Cir. 1991) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 53 (1978)).

In light of these purposes, this Court has held that Congress intended the remedial scheme of the CSRA to preclude other avenues of relief for actions arising out of federal employment. In *Fausto*, the Court held

---

[5] Moreover, the MSPB's jurisdiction was not at issue in *Grigsby*, where the district court had jurisdiction under a special provision of the CSRA, 5 U.S.C. 7121(f). 729 F.2d at 774 n.4.

that the CSRA's administrative and judicial review provisions precluded a federal employee from seeking judicial review of an adverse personnel action in the former United States Claims Court under the Back Pay Act, 5 U.S.C. 5596(b)(1), even though the CSRA provided no administrative remedy for the personnel action at issue. 484 U.S. at 454-455.

The courts of appeals have likewise consistently held, both before and after *Fausto*, that the CSRA's remedial scheme precludes all other avenues of relief for claims brought by federal employees arising out of the federal employment relationship. See, *e.g.*, *Saul*, 928 F.2d at 843 (no district court jurisdiction over state common law tort claims against a federal employee's supervisor); *Ryon* v. *O'Neill*, 894 F.2d 199, 204 (6th Cir. 1990) (challenge to reassignment decision); *Harrison* v. *Bowen*, 815 F.2d 1505, 1516 (D.C. Cir. 1987) (excepted-service employee's claim of wrongful termination). Although no previous case has addressed claims exactly like those presented here, the courts of appeals have held that federal employees may not obtain review by the district courts of similar claims, such as claims of a scheme to prevent an employee from being promoted, see *Schrachta* v. *Curtis*, 752 F.2d 1257, 1260 (7th Cir. 1985) (holding that CSRA did not create an implied right of action in the district courts), and challenges to performance ratings and to the federal rating system in general, see *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984) (finding "a clear congressional intent to permit federal court review as provided in the CSRA or not at all"). See also *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1576 (11th Cir.) (challenge to denial of promotion), cert. denied, 498 U.S. 998 (1990). In light

of this uniformity of circuit authority, "[t]here is no longer any serious dispute that the CSRA preempts challenges to personnel actions brought under federal law." *Berrios* v. *Department of Army*, 884 F.2d 28, 30 (1st Cir. 1989).

b. For the same reasons, the CSRA precludes petitioners' *Bivens* claims for alleged violations of constitutional rights in connection with their federal employment. See *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983). In *Bush*, this Court found that the "elaborate remedial system that has been constructed [in the CSRA] step by step, with careful attention to conflicting policy considerations," *id.* at 388, constitutes a "special factor" counseling against creation of a new remedy, and concluded that a *Bivens* claim by an employee based on actions taken by his supervisor is precluded. Subsequently, in *Schweiker* v. *Chilicky*, 487 U.S. 412, 427-428 (1988), the Court extended the holding of *Bush* to foreclose *Bivens* suits even where the statutory remedy for the alleged constitutional violation is incomplete. See also *Bush*, 462 U.S. at 388.

The lower courts have uniformly followed *Bush* and *Chilicky* in holding that *Bivens* actions arising out of federal employment are precluded. *Saul*, 928 F.2d at 840 (no *Bivens* remedy for allegedly unconstitutional opening of mail received at office); *Berrios*, 884 F.2d at 31 (no *Bivens* remedy for alleged due process violation in termination without notice); *Hill* v. *Department of Air Force*, 884 F.2d 1318, 1321 (10th Cir. 1989) (no *Bivens* action for alleged due process violations that constitute prohibited personnel practices), cert. denied, 495 U.S. 947 (1990); *Karamanos* v. *Egger*, 882

F.2d 447, 452 (9th Cir. 1989) (no *Bivens* remedy for alleged First Amendment violations).

c. In light of the overwhelming precedent cited above, it is clear that the courts below correctly held that petitioners' claims, indisputably relating to their federal employment, had to be dismissed. Petitioners have not cited, nor are we aware of, any court of appeals decision recognizing a cause of action for claims similar to theirs arising out of the federal employment relationship. For these reasons, no further review of the Ninth Circuit's decision is warranted.[6]

3. *The Effect of the Federal Circuit's Decision on the Ninth Circuit's Jurisdictional Ruling*

a. The ultimate gravamen of the petitions is that petitioners' claims should have been heard by either the MSPB or the district court, and that they cannot be foreclosed from both forums. Specifically, petitioners contend that the Ninth Circuit should not have upheld the dismissal of their district court case after it was informed that the Federal Circuit had affirmed the MSPB's finding of lack of jurisdiction.

As the Ninth Circuit implicitly recognized (see Pet. App. 5 n.1), however, the dismissal of petitioners' claims by the MSPB does not create district court jurisdiction over those claims. The CSRA preempts alternative routes of judicial review of claims based on federal employment actions, even when the CSRA itself provides no administrative remedy for the

---

[6] In any event, petitioners' *Bivens* action against GSA could not proceed in light of this Court's decision in *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004-1006 (1994), holding that *Bivens* actions may not be implied against federal agencies.

particular claim. Thus, as discussed above, this Court held in *Fausto* that the CSRA foreclosed an employee's resort to the United States Claims Court under the Back Pay Act, even though the employee had no CSRA remedy by which to challenge his suspension. 484 U.S. at 455. The Court concluded that, because the CSRA carefully addressed the rights of Fausto's category of federal employees elsewhere, that category's exclusion from the CSRA remedy at issue (MSPB review) was deliberate and represented a "clear congressional intent" to preclude access, not just to remedies under the CSRA, but also to the judicial remedies that had been available before the enactment of the CSRA. *Id.* at 448-449. The Court stated:

> It seems to us evident that the absence of provision for [non-preference-eligible excepted-service employees] to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75.

Ibid.

This Court also observed in *Fausto* that to recognize a remedy allowing non-preference-eligible excepted-service employees to bring suit in federal court would turn the structure of the CSRA "upside down," 484 U.S. at 449, by giving them a right, *i.e.*, judicial review, that was not available to better protected employees. The same is true here; petitioners are asking for a right that is not available to

permanent employees with greater protections under the CSRA, *i.e.*, the right to bring a *Bivens* action in district court. Such a conclusion would be inconsistent with Congress's determination that permanent federal employees should have more extensive procedural protections than temporary employees, and it would undo Congress's balancing, in the CSRA, of the rights of various classes of federal employees.

The lower courts have uniformly concluded that the lack of a remedy or a complete remedy under the CSRA does not confer district court jurisdiction under *Bivens* or any other theory of implied rights of action. The courts have declined to create new remedies "to prevent them from conflicting with the remedial system that Congress prescribed." *Saul*, 923 F.2d at 843. The CSRA is "so precise and delicately balanced that the engrafting of ancillary remedies upon the framework of the Act would inevitably create chaos within the federal sector, and sow the seeds of impermissible conflict." *Id.* at 842 n.25 (quoting *Tucker* v. *Defense Mapping Agency*, 607 F. Supp. 1232, 1239 (D.R.I. 1985)); see also *Rivera* v. *United States*, 924 F.2d 948, 951 (9th Cir. 1991); *Ryon*, 894 F.2d at 204 ("To hold * * * that personnel actions are reviewable in federal courts under general jurisdictional statutes enacted before the CSRA would mean a return to the chaotic conditions which the CSRA was specifically crafted to remedy.").

b. The fact that petitioners have no judicial forum for their claims does not violate their constitutional rights. Although this Court has cautioned that " 'serious constitutional question[s]' * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim,"

Webster v. *Doe*, 486 U.S. 592, 603 (1988), this case does not implicate that concern. As temporary employees with no legitimate expectation of continued employment, petitioners had no property interest at stake, and they therefore had no constitutional right to due process before they were removed from their positions. See *Board of Regents* v. *Roth*, 408 U.S. 564, 578 (1972) (no property interest where no claim of entitlement to continued employment).

While not denying that they were serving under temporary appointments, petitioners contend that they had an entitlement to continued employment under *Perry* v. *Sindermann*, 408 U.S. 593 (1972), due to a "mutually explicit" understanding (Pet. 13-14). However, as explained above, see note 4, *supra*, the expectations of employment under the CSRA are governed exclusively by the terms of the appointment itself, and quasi-contractual understandings outside those terms do not create constitutionally protected property rights. To hold otherwise would contravene the principle that the CSRA provides the exclusive remedies for all employees covered by its terms. The principal case relied on by petitioners, *Orloff* v. *Cleland*, 708 F.2d 372, 377 (9th Cir. 1983), is inapposite, as it involved a government employee not covered by the CSRA; in that situation, extrinsic evidence may have been relevant to determine whether the employee had a property interest, created by contract, in his continued employment.[7]

c. In any event, petitioners were not completely without administrative remedies. If petitioners be-

---

[7] *Roth* v. *Veteran's Administration*, 856 F.2d 1401, 1409 (9th Cir. 1988), cited by petitioners (Pet. 14), also involved a non-CSRA employee.

lieved that they were terminated in violation of merit system principles, they could have submitted their allegations to the Office of Special Counsel, which has the authority to investigate prohibited personnel practices, to seek corrective action from federal agencies, and to institute proceedings before the MSPB, see 5 U.S.C. 1212(a), 1214, 1215, and 2302(a) and (b) (1988 & Supp. IV 1992), even when the employee may not personally appeal directly to the MSPB. See *Harrison*, 815 F.2d at 1511-1512. Temporary employees are entitled to pursue this remedy.[8] See 5 U.S.C. 2302(a)(2)(B).

---

[8] Petitioners err in suggesting (Pet. 11 n.4) that temporary employees are barred from this avenue. They overlook the distinction between the two types of MSPB jurisdiction, appellate and original. Appellate MSPB jurisdiction involves appeals by employees from final personnel actions, from which avenue temporary employees are barred. See, *e.g.*, *Hunter* v. *Department of Army*, 40 M.S.P.R. 449, 451 (1989); *Cinnamon* v. *FAA*, 10 M.S.P.R. 598 (1982). Original MSPB jurisdiction involves actions initiated in the MSPB by the Special Counsel on an employee's behalf on the grounds of prohibited personnel practices. Temporary employees are not barred from seeking relief by this route, nor is the OSC barred from bringing the temporary employee's complaints to the MSPB. See, *e.g.*, *Special Counsel* v. *GSA*, 45 M.S.P.R. 411 (1990) (granting Special Counsel's request to stay the expiration of a temporary employee's appointment); *Wren* v. *Department of Army*, 2 M.S.P.R. 1, 2 (1980) (explaining distinction between the two types of proceedings, and, after holding that appellant could not herself appeal her termination to the MSPB, referring her allegations to the Special Counsel).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARC RICHMAN
CAROL FEDERIGHI
Attorneys

MAY 1994